

DIVISION NINE PAINTING COMPANY,)
)
 Appellant,)
)
 v.)
)
 State of Washington, DEPARTMENT)
 OF ECOLOGY,)
)
 Respondent.)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Appellant Division Nine was represented by its owner and president Charles Bernert. Respondent DOE was represented by

1 Assistant Attorney General Lucy E. Phillips. Court reporter Kathryn
2 A. Beehler with Gene A. Barker & Associates recorded the proceedings.

3 Oral testimony was heard. Exhibits were admitted and reviewed.
4 Argument was made. From the foregoing, the Board makes these:

5 FINDINGS OF FACT

6 I

7 Division Nine Painting Company was a business operating in
8 Washington during the period in question in 1988. Mr. Charles Bernert
9 owned and was president of the company. The company is no longer in
10 business.

11 Mr. Bernert had been a firefighter for about 15 years. He left
12 that occupation in about 1980. While a firefighter, he had overseen
' procedures for a major port's handling of hazardous waste. Appellant
14 is currently a project manager for a paint company.

15 II

16 The Department of Ecology is a state agency and authorized to
17 enforce the State's Dangerous Waste Regulations, Chapt. 173-303 WAC.

18 III

19 On October 24, 1988, at about 9:30 p.m. on a dark and foggy
20 night, Kitsap County Fire District No. 1 received a citizen complaint
21 about an unattended fire at the 6100 block of Apex Road near the Apex
22 Airport about one mile west of Silverdale. There are residences near
23 the airport. A fire team was sent out, along with a medic unit.

24 The fire team arrived at the fairly heavily wooded site where
25

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1 they saw several burn piles. There were flames up to 20 feet high.
2 The only other person on-site was someone asleep in a VW van. After
3 10 minutes on-site near the fires, two firefighters got headaches.
4 One had a headache for one to two days, which was unusual for this
5 individual.

6 The fire department chief was called to the scene.

7 There was evidence that a land-clearing operation had been
8 underway. No burn permit existed for this operation. The fire
9 department saw from 12 to 16, fifty-five gallon drums in two of the
10 burning piles. Further investigation revealed about 22 other drums a
11 considerable distance from the burn piles, with labels identifying the
12 contents as Tremproof 60H. These drums were the same size and color
13 as those on the fires. The fire chief concluded that the drums in the
14 fires were identical to those stored elsewhere on the site.

15 IV

16 The owner of the drums was identified as Mr. Charles Bernert and
17 he was called. He admitted putting the drums on the fires and
18 promised to return to the scene, which he did that night.

19 V

20 The Department of Ecology was contacted and their hazardous waste
21 spill response inspector arrived on-site at about 1:30 a.m. (now
22 October 25, 1988). The inspector put on his respirator. The fire-
23 fighters and the DOE inspector met with Mr. Bernert. He reported that
24 the material in the drums was a concrete sealer. He believed that the
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1 maximum quantity in any one drum that was on the fire was less than
2 one inch. The material had been in a gummy tar-like state.

3 It was agreed not to try and put out the fires that night. Fire
4 department and DOE personnel left the site after 2:00 a.m., after
5 placing barrier tapes across Apex Road.

6 VI

7 The next morning the DOE inspector reappeared, took photographs,
8 then made telephone calls for assistance. By then he had learned that
9 Mr. Bernert had reached an agreement with DOE about 2 weeks earlier to
10 have all the drums removed and disposed of by October 24.

11 The fire department arrived and reported about a dozen of the
12 burned drums were missing. Dual truck tire tracks were seen near the
13 piles. Mr. Bernert denied removing the burnt drums from the burn
14 piles, but had an idea who did. Bernert had the drums returned that
15 afternoon.

16 Some amount of the sealant had been spilled on the ground.
17 Further inspection during the daylight revealed, used Tyvek suits and
18 gloves on-site. These suits and gloves are worn by people for safety,
19 to provide protection from dangerous materials.

20 Mr. Bernert was informed by DOE that a licensed waste remover
21 would have to remove the drums. After Bernert's efforts to secure a
22 company failed, DOE contacted a company and they agreed to do the work.
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VII

Division Nine had been doing a job at Indian Island using Tremproof to waterproof missile facilities. Numerous drums' contents were partially used. The leftover Tremproof was not consolidated into a few drums at Indian Island, because Division Nine wanted to avoid paying the higher wage rates in effect there. Instead, all of the drums were loaded onto a truck destined for the company's headquarters in Seattle. Enroute the truck broke down, and the drums were unloaded and placed at the Apex site, near Silverdale in Kitsap County.

The drums had been at the Apex site since about late August. Mr. Bernert admitted that he had not removed all the drums from the site because he placed other priorities higher.

Alerted by a report from the Kitsap-Bremerton Health District, the DOE discovered, in September 1989, 65 drums of sealer on-site, and 3 five gallon containers of toluene. Mr. Bernert was ultimately identified as the owner and he promised to remove the drums within 2 weeks (by October 24, 1989).

On the night of October 24, 1989, between 34 and 38 of the drums were still there. At least 1100 pounds of Tremproof were on-site on October 24, 1989 in the 22 drums that contained more than one inch of Tremproof.

VII

Mr. Bernert had 16 of the drums drained so he could use the

1 Tremproof on future work. There is no evidence when this draining was
2 done. However, the Tremproof was gummy and the drums had to inverted
3 for about an hour to promote drainage. Mr. Bernert presented no
4 evidence that he completely removed all the Tremproof from these
5 drums. He did not rinse the drums.

6 We find, however, it more likely than not that these drums, just
7 prior to their being burned, contained less than one inch of Tremproof
8 at the bottom or less than one-half gallon.

9 Mr. Bernert had someone take these drained drums to a Kitsap
10 County landfill, where an attendant there said they would not be
11 accepted unless they were "blackened." Without checking with DOE, any
12 professional, or any agency expert in handling dangerous waste,
13 Bernert put these drums on the burn piles.

14 VIII

15 The labels on the Tremproof drums reads in part:

16 DANGER! VAPOR HARMFUL

17 COMBUSTIBLE. Keep away from heat and flame [. . .]
18 cancer hazard. Contains material which can cause
19 cancer. [. . .] Do not inhale vapors. [. . .]
20 Once emptied containers retain product residue and
21 vapor, observe precautions even after container is
22 emptied. Subject to hazardous waste treatment, storage
23 and disposal requirements under RCRA. Incinerate at
24 EPA approved facility or dispose of in compliance with
25 federal, state and local regulations. For further
26 safety information consult the current Material Safety
27 Data Sheet. [. . .] [Emphasis added]

IX

The Material Safety Data Sheet ("MSDS") that appellant could have obtained showed that Tremproof 60H contains among other materials: aromatic process oil 55% maximum weight, xylene (dimethylbenzene) 10% maximum weight, and free toluene diisocyanate 0.5% maximum weight.

The MSDS lists Tremproof 60H's flash point at 120 degrees F., and further warns that during ignition hydrocyanic acid can form. It states that a welding or cutting torch is never to be used "on or near container (even empty). Product or residue can ignite explosively." The MSDS states that the "precautions also apply to emptied containers".

X

We find that more likely than not there was some Tremproof remaining in the 12 to 16 drums prior to their being burned. Mr. Bernert has not proven that the Tremproof remaining in the drums was so "cured" that all the aromatic process oil, xylene and toluene diisocyanate evaporated and was not present in the drums in either liquid or gaseous form when the drums were burned.

XI

The Tremproof contained two carcinogens: aromatic process oil and free toluene.

XII

We find, in light of the label, the MSDS and the physical

1 reaction of the firefighters, that the burning of the residue sealant
2 threatened public health and the environment.

3 XIII

4 After a certificate from the Seattle King County Department of
5 Public Health, the 16 burnt drums were authorized for disposal at the
6 Cedar Hills landfill in King County.

7 XIV

8 After the two days of the incident, Division Nine paid \$3,128.16
9 for transporting the dangerous waste, \$962.76 for Fire Department
10 overtime, and \$4,243 for a "still" to help dispose of other solvents
11 and surplus product.

12 XV

13 The DOE issued Notice of Penalty Incurred and Due No. DE 88-N212
14 to Division Nine, assessing a \$6,000 penalty. Division Nine filed an
15 Application for Relief with DOE, and also filed a mitigation request
16 with the Pollution Control Hearings Board. The Board assigned the
17 appeal PCHB No. 89-20, and deferred any action pending DOE's
18 response. By Notice of Disposition dated May 11, 1989, DOE affirmed
19 the \$6,000 penalty. Mr. Bernert renewed his appeal before this Board,
20 the hearing was scheduled and held.

21 XVI

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby
23 adopted as such. From these Findings of Fact, the Board makes these:
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these parties and subject matter.
4 Chapt. 70.105 RCW.

5 II

6 The Department of Ecology has alleged two violations:
7 WAC 173-303-141 and WAC 173-303-145.

8 Section 141 provides in pertinent part that:

9 (1) A person shall only offer a designated dangerous
10 waste to a TSD facility which is operating either:
11 Under a permit issued pursuant to the requirements
of this chapter: or [. . .]

12 Section 145 provides in part:

13 WAC 173-303-145 Spills and discharges into the
14 environment. (1) Purpose and applicability. This
15 section sets forth the requirements for any person
16 responsible for a spill or discharge into the environment,
17 except when such release is otherwise permitted under
18 state or federal law. For the purposes of complying with
19 this section, a transporter who spills or discharges
20 dangerous waste or hazardous substances during
21 transportation will be considered the responsible person.
22 This section shall apply when any dangerous waste or
23 hazardous substance is intentionally or accidentally
24 spilled or discharged into the environment (unless
25 otherwise permitted) such that public health or the
environment are threatened, regardless of the quantity of
dangerous waste or hazardous substance.

(2) Notification. Any person who is responsible for a
nonpermitted spill or discharge shall immediately notify
the individuals and authorities described for the
following situations:

23 [. . .]

24 (b) For spills or discharges which result in

1 emissions to the air, notify all local authorities in
2 accordance with the local emergency plan. If necessary,
3 check with the local emergency service coordinator and
4 fire department to determine all notification
5 responsibilities under the local emergency plan. Also, in
6 western Washington notify the local air pollution control
7 authority, or in eastern Washington notify the appropriate
8 regional office of the department of ecology.

(3) Mitigation and control. The person responsible
for a nonpermitted spill or discharge shall take
appropriate immediate action to protect human health and
the environment (e.g., diking to prevent contamination of
state waters, shutting of open valves).

(a) In addition, the department may require the person
responsible for a spill or discharge to:

(i) Clean up all released dangerous wastes or
hazardous substances, or to take such actions as may be
required or approved by federal, state, or local officials
acting within the scope of their official
responsibilities. This may include complete or partial
removal of released dangerous wastes or hazardous
substances as may be justified by the nature of the
released dangerous wastes or hazardous substances the
human and environmental circumstances of the incident,
and protection required by the Water Pollution Control
Act, chapter 90.48 RCW; [. . .] [Emphasis added.]

IV

The asserted violations which form the basis for the penalty
under appeal relate solely to the burning which occurred on October
24, 1988. For a violation of Chapt. 173-303 WAC to have occurred, the
Tremproof has to be a "solid waste" as defined under WAC 173-303-016,
and a waste that is "dangerous" as defined under WAC 173-303-040(18).

We conclude that the Tremproof residue which was burned was
"solid waste" consisting of discarded materials which were abandoned

1 by being burned or incinerated. None of the exclusions from the
2 definition of "solid waste" were proven.

3 V

4 The "dangerous waste" definition refers to the "designation"
5 process of WAC 173-303-070 through WAC 173-303-103. WAC 173-303-090
6 provides that a material is a dangerous waste if it is ignitable.
7 WAC 173-303-090(5). The warning label and the MSDS make this
8 ignitability obvious.

9 VI

10 A "solid waste" can also be a "dangerous waste" if it is
11 "carcinogenic." WAC 173-303-070(3)(b)(iii). WAC 173-303-103(1). We
12 conclude that Tremproof is a "dangerous waste" due to its ignitability
13 and to the carcinogenic components.

14 VII

15 Xylene is classified as a dangerous waste at F0003 in the WAC
16 173-303-9904. It is a spent non-halogenated solvent. Therefore,
17 Tremproof is also a dangerous waste due to the xylene.

18 VIII

19 WAC 173-303-160 provides in pertinent part:

20 Containers. [. . .]

21 (2) A container or inner liner is "empty" when:

22 (a) All wastes in it have been taken out that can be
23 removed using practices commonly employed to remove
24 materials from that type of container or inner liner
25 (e.g., pouring, pumping, aspirating, etc.) and,
whichever quantity is least, either less than one inch
of waste remains at the bottom of the container or

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1 inner liner, or the volume of waste remaining in the
2 container or inner liner is equal to one percent or
less of the container's total capacity, [. . .]

3 (3) any residues remaining in containers or inner
4 liners that are "empty" as described in subsection
5 (2) of this section will not be subject to the
6 requirements of this chapter, and will not be
7 considered as accumulated wastes for the purposes of
8 calculating waste quantities. [Emphasis added.]

9 We have found that it was more likely than not the Tremproof in
10 the drums prior to burning was less than one inch. Finding of Fact
11 VII, above. Therefore, prior to being burned these drums were "empty"
12 under WAC 173-303-160(2).

13 We conclude that by virtue of the general exclusion set forth in
14 WAC 173-303-160(3), "empty" drums are not governed by WAC
15 173-303-141's requirements for disposal only at permitted TSD
16 facilities. We note that the waste removal contractor ultimately
17 disposed of the burned drums at King County's Cedar Hills Landfill.
18 It makes sense that such "empty" barrels need not be subjected to the
19 full panoply of regulation of this chapter. Therefore, there is no
20 violation of WAC 173-303-141.

21 IX

22 When different regulatory provisions are in conflict, the more
23 specific provision shall control. ITT Rayonier v. Hill, 78 Wn.2d 100,
24 478 P.2d 729 (1970). We conclude that "empty" drums, are not exempted
25 by WAC 173-303-160(3) from the requirements of WAC 173-303-145.
26 Section 145 by its own terms applies, "regardless of the quantity of

1 the dangerous waste", when a spill or discharge threatens the public
2 health or environment.

3 X

4 The maximum penalty for each violation of the dangerous waste
5 regulations this occurrence is \$10,000 per day. RCW 70.105.080.

6 One of the key goals of civil penalties is to promote
7 compliance. In this instance a person with a background involving
8 working with hazardous wastes as a fire fighter, intentionally burned
9 drums containing dangerous waste. He knew when he did the act that it
10 was wrong. On the last day of his agreed disposal schedule, he chose
11 to take what he thought would be a fast, cheap means of disposal, and
12 burned, at night. Such conduct merits a \$6,000 penalty. We are
13 underpersuaded that the costs he incurred for the emergency response
14 (\$962.76 firefighter's time and \$3,128.16 disposal) should somehow
15 serve as a off-set and reduce the penalty. The costs of buying the
16 still (\$4,243) were to allow him to recover future materials, a
17 necessary business expenditure, and also have no merit as an off-set.

18 XI

19 Any Finding of Fact deemed to be a Conclusion of Law is hereby
20 adopted as such.

21 From these Conclusions of Law the Board enters this:
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ORDER

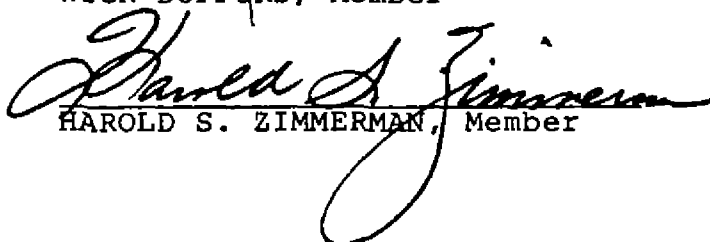
Notice of Disposition of Penalty No. DE 88-N212 (\$6,000) is
AFFIRMED.

DONE this 8th day of January, 1990.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member